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No. 85-2130

# In the Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT W. AKERS, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

PETER R. STEENLAND, JR.
JACQUES B. GELIN
EDWARD J. SHAWAKER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether the district court abused its discretion in entering a preliminary injunction to prevent petitioner Akers from discharging dredged or fill material into wetlands on his property without a permit issued under Section 404 of the Clean Water Act, 33 U.S.C. (& Supp. II) 1344, where petitioner was undertaking a new operation on the wetlands that would entail a substantial alteration to its hydrological regime.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B20) is reported at 785 F.2d 814. The opinion of the district court (Pet. App. C1-C25) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on March 26, 1986. The petition for a writ of certiorari was filed on June 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The Clean Water Act, 33 U.S.C. (& Supp. II) 1251 *et seq.*, was enacted in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's Waters." The Act prohibits, inter alia, the discharge of pollutants into "navigable waters," unless the Secretary of

the Army—acting through the Corps of Engineers—issues a permit pursuant to Section 404 of the Act, 33 U.S.C. (& Supp. II) 1344. Under regulations promulgated by the Corps, and not disputed in this case, "navigable waters" includes wetlands adjacent to waters otherwise covered by the Act. See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985).

Section 404(f) of the Act, 33 U.S.C. 1344(f), provides certain exemptions from the permit obligations of Section 404. Among these exemptions is Subsection (f)(1)(A), which allows discharge without a permit that results "from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

This "normal farming" exemption, however, together with the other permit exemptions enumerated in Subsections (f)(1)(B)-(F), are subject to a so-called "recapture provision," Subsection (f)(2). That provision states:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Thus, even if a particular activity falls within an exemption listed in Subsection (f)(1), a permit is nevertheless required if the activity is also covered by Subsection (f)(2).

2. In January 1984, Robert W. Akers, one of the petitioners, bought a tract of some 9,600 acres in northern California (Pet. App. B2). Approximately 2,889 acres of this land, known locally as the "Big Swamp," were determined by the Corps of Engineers to be adjacent wetlands

within the meaning of the Corps' regulations (33 C.F.R. 323.2(c); Pet. App. B2, C2). In addition, Ash Creek, a tributary of the Pit River, flows across the property (Pet. App. B2). For purposes of his petition, Mr. Akers does not dispute that this property constitutes wetlands subject to the Corps' permit jurisdiction (Pet. 4; Pet. App. B2 n.1).

Shortly after Mr. Akers bought the land, he "developed a farming plan for his property which, in effect, provided for the leveling and filling of the Big Swamp area and diversion of the waters which normally feed it" (Pet. App. C2). In pursuit of this plan, on July 16, 1984, Mr. Akers built a dike 3,500 feet long, two to three feet high, and six feet wide, in the western portion of the property. When the Corps of Engineers learned of this dike, Mr. Akers initially explained that he was "ditch cleaning." Later he claimed that he was repairing a pre-existing irrigation structure. Pet. App. B3, C4. In late July or early August, the Corps of Engineers determined that a permit was required, and issued a cease and desist order to prevent the completion of the dike. By then, however, the project was finished. The Corps withdrew the order when Mr. Akers assured them that he was simply reconstructing a pre-existing dike. *Id.* at B3-B4, C4-C5.

In September 1984, the Corps learned that Mr. Akers was pursuing major work in the central portion of the wetlands. A Corps aerial survey revealed that a two-mile-long dike had been built through the wetlands, connecting to the dike on the western portion of the property. A grader and tractor were seen along the dike, and wetlands south of the dike had been leveled. In light of these further developments, on September 13, the Corps issued another cease and desist order. Nonetheless, some four days later, a second aerial survey disclosed that sometime between September 13 and September 17 the east-west dike had been extended from two to three miles. Pet. App. B4, C4-C6.

On September 26, 1984, the Corps discovered that Mr. Akers had dug a large ditch on the eastern edge of the property, which filled two channels of Ash Creek. The Corps also observed that Mr. Akers had built roads in the northwest section of the property, which effectively blocked several overflow channels of the Pit River. Pet. App. B4, C5-C6.

3. On October 3, 1984, the United States sued Mr. Akers, seeking declaratory and injunctive relief, civil penalties, and restoration.[1] On October 24, following briefing, the submission of documents, and a hearing, the district court orally granted the government's motion for a preliminary injunction. Subsequently, the district court allowed additional parties to intervene,[2] and entertained motions to reconsider its injunction. Following argument, the district court denied the motions and issued written Findings of Fact and Conclusions of Law and an order (Pet. App. C1-C25).

In its factual findings, the district court determined that Mr. Akers' construction projects, "if not broken or dismantled, [would] prevent the natural flow of water to the southern wetlands, causing them to dry up." If Mr. Akers' works were allowed to remain in place, or expanded, the court continued, "an extensive area of the Big Swamp wetlands will be converted to non-wetland, thereby significantly reducing the reach of Big Swamp." Moreover, the "flow and circulation in Ash Creek and the overflow channels of the Pit River may be impaired," and "many highly

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[1]Mr. Akers had previously sued the government, seeking an injunction and a declaration that the Corps lacked jurisdiction over his property. After his motion for a preliminary injunction was denied, Mr. Akers voluntarily dismissed the lawsuit. Pet. App. B3.

[2]The California Cattlemen's Association, California Farm Bureau, Agricultural Council of California and National Cattlemen's Association intervened in support of Mr. Akers. The National Audubon Society and National Wildlife Federation intervened in support of the United States (Pet. App. B5).

significant aquatic functions now performed by the Big Swamp wetlands area will be lost or impaired." Pet. App. C6. In short, the court determined, "Mr. Akers has either misunderstood or callously disregarded the potential environmental consequences of his activities"; and "if not enjoined, [his actions] will have the effect of splitting the Big Swamp into northern and southern halves, with the potential eventual effect of drying up the southern portion" (*id.* at C7-C8).

The district court next determined, as a conclusion of law, that Mr. Akers was not exempt, under Subsection (f)(1), from the obligation to secure a permit for the work he was doing on the wetlands. In particular, the court rejected petitioner's assertion (Pet. App. C14) that he fell within the exemption for "normal farming" activities, contained in Subsection (f)(1)(A). In so holding, the court applied the Corps' regulation, 33 C.F.R. 323.4(a)(1)(ii), governing the "normal farming" exemption. That regulation provides:

> To fall under this exemption, the activities * * * must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

Applying this regulation, the court found that the Big Swamp had never been part of any established upland farming operation and that Mr. Akers' proposed discharge activities would require major hydrological modifications, all contrary to the definition of "normal farming" in the Corps' regulation. Pet. App. C13-C15.

As an alternative holding, the district court concluded that "[e]ven if Mr. Aker's [*sic*] activities did fall within the 'normal farming' exception of § 404(f)(1)(A), they would remain subject to permit requirements under the exception to the exemption contained in subsection(f)(2)" (Pet. App. C15). Reviewing the record the court found that "Mr. Akers' activities are bringing the southern wetlands into a use to which they have not previously been subject, and which is resulting in an impairment of water flow and circulation as well as a reduction of the wetlands' reach" (*ibid*). "Accordingly," the court determined, "plaintiff has established a probability of success on its claim that defendant's recent activities are not encompassed within the reach of § 404(f)(1)(A) and, in any event, would fall within the subsection (f)(2) exception to the (f)(1)(A) exception" (*id.* at C17).

The district court therefore issued a preliminary injunction (Pet. App. C24) preventing Mr. Akers from discharging dredged or fill materials into the waters on his property until he first obtained a permit from the Corps or received a determination by the Corps (within 15 days of Mr. Akers' application) that a permit was not needed.[3]

4. The court of appeals affirmed (Pet. App. B1-B20), holding that the factual findings made by the district court were "comprehensive and reflect[ed] a well-balanced consideration of the competing interests" (*id.* at B19). With respect to the "normal farming" exemption pressed by petitioner, the court of appeals acknowledged, on the one hand,

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[3]The district court also rejected Mr. Akers' claims that his activities fell within the exemptions for irrigation ditches (Subsection (f)(1)(C)) and farm roads (Subsection (f)(1)(E)) (Pet. App. C17-C20). It further concluded that the application of the Clean Water Act did not abridge Mr. Akers' state water rights (*id.* at C21). Mr. Akers does not renew these claims in support of his petition for certiorari, nor do the intervenors make these claims on his behalf.

that "normal farming" may well include a farmer who "desire[s] merely to change from one wetland crop to another" (*id.* at B11). Agreeing with the district court, however, the court held that petitioner sought to effect much more dramatic changes in the wetlands than simply the rotation of wetland crops (*id.* at B10-B11):

> The record amply supports the [district] court's finding that upland crop production has not occurred on these wetlands on a regular basis. Upland farming represents a new operation in the wetlands.
>
> Moreover, Akers['] * * * activities require substantial hydrological alteration to Big Swamp, and run afoul of the regulations.

The court of appeals also affirmed the district court's alternative holding, concluding that the "recapture" provision, Subsection (f)(2), required petitioner to secure a permit regardless of whether he fit within the "normal farming" exemption in Subsection (f)(1) (Pet. App. B16-B17). The court of appeals noted that Subsection (f)(2) must be construed in light of "the intent of Congress in enacting the [Clean Water] Act [which] was to prevent the conversion of wetlands to dry lands" (*id.* at B17). The Act, to be sure, does not require a permit for each and every alteration in the wetlands; as the court put it, "[i]t is * * * the substantiality of the impact on the wetland that must be considered in evaluating the reach of § (f)(2)" (*ibid.*). Here, the court concluded, the findings of fact of the district court, which were not clearly erroneous, established that petitioner's discharge activities would convert an extensive part of the Big Swamp into non-wetland and measurably impair the flow of water within it (*id.* at B17-B18). In short, while the court was "mindful of the plight of today's farmers," and while "Congress * * * did not intend to prohibit all changes

of wetlands, however minor, without prior Corps approval," still "[t]he changes proposed by Akers are far from minor * * *. They contemplate a major conversion from wetlands to dry lands, thereby necessitating a Corps permit." *Id.* at B20. The court of appeals therefore affirmed the preliminary injuction (*ibid.*).

## ARGUMENT

In affirming the grant of a preliminary injunction in this case, the court of appeals first rejected petitioner's claim that he fell within the "normal farming" exemption to the permit obligation, under Subsection (f)(1)(A). Alternatively, the court held that even if petitioner were otherwise exempt, his activities were covered by the recapture provision, Subsection (f)(2). The court's decision is correct and does not conflict with any decision of this Court or of any other circuit. Accordingly, further review is unwarranted.

a. Mr. Akers asserts (Pet. 10-11) that because the wetlands have been "farmed since the turn of the century" and are "not being converted into a housing development, golf course, or shopping center", his activites on the land fall within the ambit of the "normal farming" exemption to the permit requirement. As petitioner construes the exemption, no permit is necessary as long as an owner continues to pursue an activity that can plausibly be called "farming"—regardless of how novel the use of the land is or how dramatically it affects the hydrological regime. The court of appeals correctly rejected this contention.

First, the plain language of Subsection (f)(1)(A) makes clear that not every activity that may conceivably be called "farming" is embraced by the exception. Only "normal" farming is exempted; and even petitioner concedes that his reconstruction work will "intensify" the established farming uses of the property (Pet. 11). Moreover, the Subsection enumerates the kinds of activities that are included as

"normal farming"; among these are such moderate uses of the land as "seeding," "minor drainage," and "harvesting for the production of food." The undisputed evidence in this case established that Mr. Akers' activities "represent[] a new operation in the wetlands * * * the effect of which is to drain the wetlands [and] * * * require substantial hydrological alteration to Big Swamp" (Pet. App. B10-B11). This is a far cry from the kinds of activities enumerated in the statute.[4]

In nevertheless asking this Court to construe the "normal farming" exemption broadly—so that his activities may be covered—petitioner also ignores the familiar principle that "remedial legislation * * * should * * * be given a liberal interpretation [and] for the same reason[,] exemptions from its sweep should be narrowed and limited to effect the remedy intended." *Piedmont & Northern Ry.* v. *ICC*, 286 U.S. 299, 311-312 (1932). Accord *Israel-British Bank (London) Ltd.* v. *FDIC*, 536 F.2d 509, 513 (2d Cir.), cert. denied, 429 U.S. 978 (1976); *Durovic* v. *Richardson*, 479 F.2d 242, 250 n.6 (7th Cir.), cert. denied, 414 U.S. 944 (1973); *Gault* v. *Commissioner*, 332 F.2d 94, 97 (2d Cir. 1964). Even apart from this principle, however, the court of

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[4]Petitioner contends (Pet. 10) that the activities enumerated in Subsection (f)(1)(A) are simply examples of "normal farming" and are not intended to be exclusive. That is doubtlessly so, but misses the point. While the enumerated activities may not be exclusive, they do reflect the kinds of activities that Congress intended to exempt. As the court of appeals concluded, petitioner's activities on the wetlands, unlike those listed in the statute, require major hydrological alterations in the wetlands and subject the property to farming uses never before applied to the land. Considered in light of the examples listed in the statute, Mr. Akers' activities simply do not fall within the purview of "normal farming." See, *e.g.*, *Weyerhaeuser Steamship Co.* v. *United States*, 372 U.S. 592, 600-601 (1963); *Carlyle Compressor Co.* v. *Occupational Safety & Health Review Comm'n*, 683 F.2d 673, 675 (2d Cir. 1982); *Trinity Services, Inc.* v. *Marshall*, 593 F.2d 1250, 1258 (D.C. Cir. 1978).

appeals correctly construed the "normal farming" exemption (Pet. App. B8-B9), and every other circuit court that has addressed the issue has reached a similar conclusion. See *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir. 1985) (brackets in original; citation omitted) ("Our review of the legislative history of the agricultural exemptions convinces us that * * * Congress intended that Section 1344(f)(1) exempt from the permit process only 'narrowly defined activities * * * that cause little or no adverse effects either individually or cumulatively [and which do not] convert more extensive areas of water into dry land or impede circulation or reduce the reach and size of the water body.' "), cert. denied, No. 84-1613 (Oct. 7, 1985); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 925 n.44 (5th Cir. 1983).[5]

Petitioner also overlooks the administrative regulation implementing the "normal farming" exemption, 33 C.F.R. 323.4(a)(1)(ii). That regulation provides:

> To fall under this exemption, the activities * * * must be part of an established (i.e., on-going) farming, silviculture, or ranching operation. * * * Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

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[5]Moreover, the court of appeals' construction of the scope of the permit exemptions accords with the conclusion of this Court in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 319 (1982) (citation omitted), that the Federal Water Pollution Control Act, to which the 1977 Clean Water Act was an amendment, was intended " 'to establish a comprehensive long-range policy for the elimination of water pollution' " and that "[t]he permit system was the key to that policy".

This regulation, promulgated by the agency charged with administering the Section 404 permit program, is entitled to deference (*United States* v. *Riverside Bayview Homes*, No. 84-701 (Dec. 4, 1985), slip op. 9); and petitioners do not suggest that the regulation in any way conflicts with the intent of Congress. Applying this regulation (Pet. App. B10-B11), the court of appeals concluded that petitioner's activities on the wetlands would plainly bring the land into a new use and require substantial "modifications to the hydrological regime". That fact-bound conclusion, not disputed by petitioner, was clearly correct.

Petitioners nevertheless argue (Pet. 13-20) that the legislative history of Subsection (f) confirms that "Congress had every intention to exclude normal farming activities, such as crop rotations, from the domain of the Army Corps of Engineers" and therefore that "the activities of Mr. Akers fall well within the congressional intent." This begs the issue entirely. Obviously, Congress intended, as petitioners suggest, to exempt "normal farming"; that is exactly what Subsection (f)(1)(A) says. The issue, however, is whether by "normal farming" Congress intended to exempt activities such as those pursued by Mr. Akers. The court of appeals, reviewing the applicable legislative history (Pet. App. B9), concluded that Congress did not. That conclusion accords with the decisions in the other circuits, see *Huebner*, 752 F.2d at 1240-1241; *Avoyelles*, 715 F.2d at 926, and does not warrant further consideration by this Court.

b. Mr. Akers also challenges the court of appeals' alternative holding that the recapture provision, Subsection (f)(2), required him to secure a permit, even if he were otherwise covered by the "normal farming" exemption. Petitioner argues, first, that the court of appeals construed the recapture provision too broadly by applying it, so he says, "to any activity that may alter a wetland's hydrological

regime" (Pet. 11). This is a clear misreading of the court's opinion. The court expressly held that the applicability of the recapture provision depends upon "the substantiality of the impact on the wetland" (Pet. App. B17). Indeed, the court stated quite plainly that Congress did not "intend[] to place the burden of Corps permit regulation on farmers who desire merely to change from one wetland crop to another" (*id.* at B11). Petitioners' real objection, therefore, is not to the legal standard used by the court of appeals in applying Subsection (f)(2), but rather to its fact-bound determination that Mr. Akers' activities would have "the effect of * * * drain[ing] the wetlands [and would] * * * require substantial hydrological alteration to Big Swamp" (Pet. App. B10-B11).

Petitioners argue, finally, that Subsection (f)(2) applies only "when a farmer attempts to put previously *unfarmed* land into production by destroying or altering an existing wetland" (Pet. 11 (emphasis in the original)). According to petitioners, the recapture provision does not apply when a wetlands has been used in the past for some type of farming activity and is thereafter used for another type of farming activity—no matter how drastic an alteration in the hydrology is entailed. The court of appeals' survey of the legislative record confirms that petitioners' construction of this provision is mistaken (Pet. App. B17). Moreover, petitioners' contention to the contrary notwithstanding (Pet. 11), the other courts that have considered the recapture provision have construed it in precisely the same way as the court of appeals did in this case; and in the process, these courts rejected arguments virtually indistinguishable from those advanced by petitioners. See *Huebner*, 752 F.2d at 1240-1241; *Avoyelles*, 715 F.2d at 926.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

PETER R. STEENLAND, JR.
JACQUES B. GELIN
EDWARD J. SHAWAKER
*Attorneys*

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